

REMARKS

Claims 1-45 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Kepplinger et al (US Pub. 2002/0192345) in view of Zietlow et al (US 6,432,460).

By the present amendment independent claims 1 and 14 have been amended to clearly define that it is an extruded aerated confection and that the aerated confection gells to a cuttable mass within 6 minutes after extrusion of the aerated confection. Independent claim 28 has been amended in step E to include extruding the aerated mallow mixture with said extruded aerated mallow mixture gelling to a cuttable mass within 6 minutes. Support for these amendments is found throughout the specification and specifically in paragraphs 13 and 15.

As indicated above, the Examiner rejected claims 1-45 under 35 U.S.C. § 103(a) as being unpatentable over Kepplinger et al. '345 in view of Zietlow et al. '460. The Examiner admits that Kepplinger et al. fails to disclose hexametaphosphate as a component. The Examiner relies on Zietlow et al. as teaching utilization of calcium hexametaphosphate in column 6, lines 45-46 and column 7, lines 20-22. The Examiner admits that Zietlow et al. is silent as to utilizing the calcium hexametaphosphate as a gelling agent. Careful review of Zietlow et al. discloses that Zietlow et al. is utilizing the calcium hexametaphosphate as a source of calcium in the aerated confection marshmallow. Zietlow et al. does not get any gelling function from the hexametaphosphate use in his formulations. The Examiner is directed to column 5, line 63 through column 6, line 6 wherein Zietlow et al. discusses the gelling agents they use. Specifically, they use from 0.5% to 30% of a foam structuring or gelling component. The examples provided are: whipping proteins such as soy proteins, albumen, sodium caseinate, whey protein malted milk and mixtures thereof; and hydrocolloids such as protein, gelatin,

modified starches, and gums. Zietlow et al. does not teach use of hexametaphosphate as a gelling agent. In addition, Zietlow et al. discloses that the source of calcium should be utilized to provide a total calcium content to the composition of from approximately 0.15% to 10% by weight dry basis of calcium. Specifically, the Examiner is directed to column 6, lines 41-45 of Zietlow et al. As noted in column 7, lines 15-25 because the calcium hexametaphosphate is not all calcium the weight of calcium hexametaphosphate required to provide this level of calcium will be 2 to 3 times greater than the required weight of calcium. Clearly, Zietlow et al. does not utilize calcium hexametaphosphate as a gelling agent. In addition, there is no disclosure in Zietlow et al. of an aerated confection that is gellable to a cuttable mass within 6 minutes as required by the independent claims of the present application. All of the independent claims of the present application require a hexametaphosphate concentration of from 0.01% to 0.02% by weight and thus require much lower levels of hexametaphosphate than are disclosed in Zietlow et al. Because the independent claims each include limitations not disclosed in nor made obvious by the cited references either alone or in combination the rejection of these claims, and the claims which depend therefrom, under 35 U.S.C. § 103(a) based on Kepplinger et al. in view of Zietlow et al. is improper and should be withdrawn.

Reconsideration of this application as amended is respectfully requested.

It is believed that this application now is in condition for allowance. Further and favorable action is requested.

Application No. 10/698,799
Attorney Docket No. 675000-658
Reply to Office Action of July 19, 2006

The Patent Office is authorized to charge or refund any fee deficiency or excess to
Deposit Account No. 04-1061.

Respectfully submitted,

November 17, 2006
Date

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